RAJA ABDULLAH WAHMAN BIN RAJA SULAIMAN & ANOR.

v.

NIKSENG PLANTATIONS SDN. BHD. & 2 ORS. AND NIKSIAN HOLDINGS SDN. BHD. & 2 ORS.

HIGH COURT, KUALA LUMPUR.
DATO' DR. ZAKARIA M. YATIM J.
[SUIT NO. D4-22-248-88]
9 MARCH 1993

PRACTICE AND PROCEDURE: Application to strike out writ for want of proper representative endorsement - Rules of the High Court, 1980 - Order 6 Rule 3 - Whether action a derivative action and not a representative action - Whether derivative action bound by Order.

COMPANY LAW: Definition of "derivative action" - Rights of minority shareholders to bring derivative action against company - Requisite criteria for bringing derivative action.

WORDS AND PHRASES: "Derivative action".

This was an application by the second defendant to strike out the writ of summons filed by the plaintiffs on the ground that the writ had not been properly endorsed with representing capacity as required by O. 6 r. 3 of the Rules of the High Court 1980. The second defendant contended that the said writ action was a representative action and as such it required proper endorsement by virtue of the said Order and as this has not been done the writ was therefore defective and ought to be struck out.

The first plaintiff was a company director of both the first defendant and the third defendant. This being the case, and as the writ action was supposed to be made on behalf of the two companies, the writ of summons ought therefore to be instituted in the name of either the first defendant or the third defendant and not in the name of the first plaintiff personally. The first plaintiff however averred that he was unable to bring this action in the name of either the first defendant or the third defendant as the Board of the former was controlled by the second defendant and his brother and the plaintiff was the minority shareholder in the third defendant company. The plaintiff nonetheless maintained that the writ action was a derivative action and not a representative action and as such O. 6 r. 3 of the Rules of the High Court 1980 did not apply.

Held:

[1] The indorsement in the writ is the crucial matter in a representative action. In this case if the plaintiff is suing the defendants in a representative capacity, it is clear that the writ is defective as it has not complied with O. 6 r. 3.

[2] The true nature of a derivative action is that the individual member of a company sues on behalf of the company to enforce rights derived from it. The present action is thus a derivative action and not a representative action and since it is a derivative action, the question of complying with O. 6 r. 3 does not arise.

[3] A shareholder could bring a derivative action where the wrong done to the company amounted to fraud and where the wrong doers themselves, who must be shown to have control of the company, were the ones who prevented the company from bringing the action. The statement of claim in this case has satisfied all the three requirements and the plaintiffs are therefore entitled to bring a derivative action against the defendants.

[Application dismissed].

Cases referred to:
Bowler v. John Mowlem & Co. [1954] 1 WLR 1445 ***(cit)***
Ling Beng Song & Ors. v. Ling Beng Siew & Ors. [1964] 30 MLJ 395 ***(cit)***
Prudential v. Newman Industries [1982] 1 All ER 355 ***(foll)***
Birch v. Sullivan & Anor. [1957] 1 WLR 1247 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 6 r. 3

Other sources referred to:
Modern Company Law, L.C.B. Gower, 3rd Edn., at pp. 587, 588, 589, 590, 591 and 592
Supreme Court Practice, Vol. 1, p. 10

For the first plaintiff - K. Anantham (T. Thomas with him); M/s. Skrine & Co.
For the second defendant - Anad Krishnan; M/s. James Foong & Anad

JUDGMENT

Dr. Zakaria M. Yatim J:
This is an application by the second defendant for an order:

(1) that the writ of summons in this suit be struck out on the ground that the writ has not been endorsed with the representing capacity in which the plaintiffs are suing

and/or alternatively on the ground that this action is not properly constituted in that the plaintiffs are not entitled to sue on behalf or as representative of Nikseng Plantations Sdn. Bhd. (Nikseng);

(2) consequently, for an order that the *ex parte* order granted by this Court on 1 December 1988 be dissolved;

(3) that an enquiry into damages suffered by the second defendant by reason of or arising out of the said *ex parte* order be directed;

(4) that the plaintiffs do pay the second defendant costs (including the costs of this application) to be taxed by a proper officer of the Court; and

(5) such further or other orders or directions be made or given as the Court deems fit.

I shall now deal with prayer 1 of the application.

In his affidavit in support of the application, the second defendant avers that he is the director of Nikseng. The other directors of Nikseng are Naik Cheu Ting and the first plaintiff. According to him, from the statement of claim, the plaintiffs are suing him and the other two defendants on the basis of representative action for and on behalf of Nikseng. He contends that where a representative action is commenced, the writ of summons has to be endorsed with the representative capacity in which the plaintiffs have commenced the action. He avers that Nikseng has not held a general meeting authorising the two plaintiffs to commence the present action. He further avers that the board of directors of Nikseng has not authorised the plaintiffs to commence any proceeding on behalf of Nikseng. He says that the second plaintiff is a 50% shareholder in the third defendant which in turn owns all the shares in Nikseng. He states, that by virtue of the second plaintiff's shareholding in the third defendant, the second plaintiff's action for and on behalf of Nikseng is misconceived as it is not a minority shareholder's action.

At the hearing of the application, Mr. Anad Krishnan, Counsel for the second defendant submitted that the writ be struck out on the ground that it is defective in that O. 6 r. 3 has not been complied with. Order 6 r. 3 *inter alia* states:

> 3(1) Before a writ is issued it must be indorsed:
>
> (a) Where the plaintiff sues in a representative capacity, with a statement of the capacity in which he sues ...

In support of his argument, Mr. Anad Krishnan cited two cases. The first case is *Bowler v. John Mowlem & Co.* [1954] 1 WLR. 1445. In that case Denning LJ in his judgment at p. 1147 said:

> In the title of the writ she is described as administratrix but, in my opinion, that does not denote a representative capacity. That is simply a description of her status as it was believed to be. **The indorsement on the writ is the crucial matter.** Under the R.S.C., O. 3, r. 4, the indorsement is the place where representative capacity must be shown. That rule says:
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> > If the plaintiff sues ... in a representative capacity, the indorsement shall show ... in what capacity the plaintiff ... sues.
> >
> > In this indorsement it is nowhere said that the plaintiff claims as aministratrix ... **the thing which cannot be cured is the bringing of an action in a representative capacity which does not exist.**
> >
> > [Emphasis added]

At p. 1449 Hodson LJ said in the same case:

> In the statement of claim, which cannot cure defects in capacity shown on the indorsement and similarly ought not to be allowed to detract from the indorsement, she is described as administrarix and lawful relict. The vital matter to be construed is ... the indorsement itself.

The second case is *Ling Beng Song & Ors. v. Ling Beng Siew & Ors.* [1964] 30 MLJ 395. In that case McGilligan J., in his judgment at p. 396 said:

> It remains to decide whether or not I should, in exercise of my discretion, set aside the writ. In the case already quoted, of *Hill v. Luton Corporation,* Devlin J. (as he then was) said in the course of his lucid and illuminating judgment:
>
> > To set aside a writ for defective indorsement is a very strong thing to do. I have not been referred to any case where it has been done, even where the defect remained uncured, except *Huntly (Marchioness) v. Gaskell,* where the Court regarded the indorsement as tantamount to an abuse of process.
>
> I do not consider this a matter for strong action, but something must be done, as the writ as it stands is not good enough. I accordingly choose the milder course of setting aside the service of the writ on each of the three defendants as was done (according to

the judgment in *Hill v. Luton Corporation)* in the case of *Truslove v. Whitechurch,* no report of which is available here and I order accordingly.

In the present case, if the plaintiff is suing the defendants in a representative capacity, it is clear that the writ has not complied with O. 6 r. 3. As Denning LJ said in *Bowler* case, the indorsement in the writ is the crucial matter. The writ is therefore defective and such defect cannot be cured.

Mr. Anantham, Counsel for the plaintiff however submitted that the present action is a derivative action and not a representative action. In support of his submission, he cited certain passages from a book, **Modern Company Law** by L.C.B. Gower, 3rd. Edn., at pp. 587, 588, 589, 590, 591 and 592. At p. 587 the learned author states:

> If any one other than the company is allowed to appear as plaintiff it is an anomaly allowed only as a matter of grace to prevent a serious wrong from going unremedied because the wrong-doers control the company. Where such an action is allowed the member is not really suing on his own behalf nor on behalf of the members generally, but on behalf of the company itself. (Although, as we shall see, he will have to frame his action as a representative one on behalf of himself and all the members other than the wrongdoers, this gives a misleading impression of what really occurs). The plaintiff shareholder is not acting as a representative of the other shareholders but as a representative of the company and the action will necessarily present features of quite different from those in the normal representative action. This has been less clearly recognised here than in the United States, where such actions have been infinitely more frequent and the appropriate rules elaborated to an extent unknown here. And there this type of action has been given the distinctive name of a 'derivative action', recognising that its true nature is that the individual member sues on behalf of the company to enforce rights derived from it. Here it is proposed to adopt this illuminating nomenclature, but the reader must be warned that it is as yet, virtually unknown in this country.

At p. 588, the learned author states:

> (i) Not every wrong to the company will justify a derivative action to remedy it. Normally the wrong complained of must be such as to involve a fraud on the minority, which could not be validly waived by the company in general meeting. What constitutes such conduct has been discussed ... Briefly ... it appears to cover conduct of the following types:
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> (a) Expropriation of the property of the company or in some circumstances, that of the minority,
> (b) Breach of directors' duties of subjective good faith, and
> (c) Voting for company resolutions not *bona fide* in the interests of the company as a whole.

At pp. 591 and 592 Gower states:

> It is regrettable that the English Judges unlike their American colleagues, have not yet realised that the derivative action differs in kind from the normal representative action where one sues on behalf of a class. Thus, it seems to be assumed that, as in the normal representative action, the plaintiff will be dominus litis until judgment and can discontinue and settle the action at his pleasure. Such a settlement (unless embodies in a formal judgment) or discontinuance will not, it is true, preclude a second action by another plaintiff shareholder. But there are obvious possibilities of abuse which the English Courts have not yet considered. Suppose the plaintiff discontinues the action in consideration of a payment made to him personally (probably out of the coffers of the company) can he hold on to it? It is submitted that he cannot and that he must account for anything that he receives to the company as whose agent he was really acting. And ought he to be allowed to settle or discontinue at his pleasure? Is there not much to be said for the salutary rule adopted in certain American jurisdiction that this will be allowed only with the Court's consent after notice has been given to all the shareholders? ...
>
> ... The right to bring a derivative action is afforded the individual member as a matter of grace. Hence the conduct of some shareholder may be regarded by a Court of equity as disqualifying him from appearing as plaintiff on the company's behalf. This will be the case for example, if he participated in the wrong of which he complains. But the mere fact that the plaintiff was not a member at the time of the wrong will not bar him from bringing the action, for he is enforcing the company's rights, not his own, and without his intervention a wrong to the company might go unremedied but he must be a shareholder of record at the time when he brings his action.

Mr. Anantham conceded that there are no English cases directly on the point.

He cited *Prudential v. Newman Industries* [1982] 1 All ER 355 where the English Court of Appeal decided:

> Although the proper plaintiff in an action in respect of a wrong done to a company was *prima facie* the company itself, exceptionally a minority shareholder could bring a derivative action where the wrong done to the company amounted to fraud and the wrong-doers were themselves in control of the company and thus able to prevent the eompany from suing but when such an action was brought by a minority shareholder the question whether in fact the company was controlled by the alleged wrong-doers should first be determined before the derivative action itself was allowed to proceed. Accordingly, the Judge had been in error in dismissing the defendants' application for the determination as a preliminary issue of the question whether the plaintiff was entitled to maintain the derivative claim against the defendants. However, since the action had in fact been heard and determined and since Newman intended to accept the order made in its favour, the question whether the plaintiff was entitled to bring the derivative action was no longer relevant.

From the passages quoted above and from the decision of the Court of Appeal in the *Prudential* case, it appears that:

(1) shareholder could bring a derivative where the wrong done to the company amounted to fraud;
(2) where the wrong-doers themselves are in control of the company; and
(3) in such an action the Court must first determine as a preliminary issue whether the company is in fact controlled by the wrong-doers.

Both Mr. Anantham and Mr. Anad Krishnan have not cited any local authority on the issue of derivative action. In the circumstances this court is obliged follow the view expressed by Gower and the decision in the *Prudential* case.

It seems to me that the present action is a derivative action and not a representative action. In a representative action, the plaintiff must be invested with a representative capacity. See **Supreme Court Practice,** Vol. 1, p.10. There is therefore a distinction between a representative action and a derivative action. Since the present action is a derivative action the question of complying with O. 6 r. 3 does not arise.

In the statement of claim the plaintiff is alleging fraud. On the question of control, paragraph 11 of the statement of claim states as follows:

> 11. The present directors of the 1st defendant are the 1st plaintiff, the 2nd defendant and his brother, Naik Cheu Ting. The present directors of the 3rd defendant are the 1st plaintiff and the 2nd defendant. The plaintiff is unable to bring this action in the name of the 1st or 3rd defendant as the board of the 1st defendant is controlled by the 2nd defendant and his brother and the plaintiff is the minority shareholder in the 3rd defendant.

In *Birch v. Sullivan & Anor.* [1957] 1 WLR 1247 it was decided that where a derivative action was brought by a minority shareholder, he must prove not only at the trial but he must also state in the statement of claim that the wrong-doers were preventing the company for bringing the action.

For the purpose of the present application, paragraph 11 of the statement of claim is sufficient to satisfy the second and third requirements.

In my opinion the plaintiffs are entitled to bring a derivative action against the defendants in the present case.

For the reasons stated above the application is dismissed with costs.